



NO. 84-82

**IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1984**

WILLIAM ROBERT PARKER,

Petitioner

V.

THE STATE OF TEXAS,

Respondent

**On Petition For Writ of Certiorari
To The Texas Court of Criminal Appeals**

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

- I. WHETHER THE EVIDENCE ADDUCED AT PETITIONER'S COMPETENCY HEARING WAS SUFFICIENT TO ENABLE A RATIONAL TRIER OF FACT TO FIND THAT PETITIONER WAS COMPETENT TO STAND TRIAL.**
- II. WHETHER PETITIONER WAS DENIED DUE PROCESS AND EQUAL PROTECTION OF THE LAW BY THE PROSECUTOR'S SUGGESTION DURING QUESTIONING AT THE COMPETENCY HEARING THAT PETITIONER HAD BEEN CONVICTED OF MURDER.**

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**TO THE HONORABLE JUSTICES OF THE SUPREME
COURT:**

NOW COMES the State of Texas, Respondent herein, by and through her attorney, the Attorney General of Texas, and files this Brief in Opposition.

OPINION BELOW

The opinion of the Texas Court of Appeals for the Sixth Supreme Judicial District is reported at 667 S.W.2d 185 (Tex.App. - Texarkana 1983), and is annexed as Appendix A to Petitioner's Petition for Writ of Certiorari. The official notice by the Texas Court of Criminal Appeals that Petition for Discretionary Review was refused is annexed as Appendix B to Petitioner's Petition for Writ of Certiorari.

JURISDICTION

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(3). The Texas Court of Appeals affirmed Petitioner's conviction on November 9, 1983. Petitioner timely filed a Petition for Discretionary Review with the Texas Court of Criminal Appeals, which was refused on May 9, 1984. Petitioner filed this Petition for Writ of Certiorari to the United States Supreme Court on July 17, 1984. Although the petition was timely filed, Respondent asserts that this Court lacks jurisdiction for the reasons in Section I below.

CONSTITUTIONAL PROVISIONS INVOLVED

The due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

A. Course of proceedings and disposition in court below

Respondent has custody of Petitioner pursuant to a judgment and sentence of the 123rd District Court of Panola County, Texas, in Cause No. 13,122, styled *The State of Texas v. William Robert Parker*. Petitioner was charged with the first degree felony offense of murder, to which he entered a plea of not guilty. Petitioner was tried by a jury, which on March 4, 1981, found him guilty of the offense charged in the indictment. The following day, the jury assessed punishment at life imprisonment in the Texas Department of Corrections. This conviction was affirmed on direct appeal. *Parker v. State*, 667 S.W.2d 185 (Tex.App. - Texarkana 1983). Following the denial of a Motion for Rehearing on December 20, 1983, Petitioner filed a Petition for Discretionary Review with the Texas Court of Criminal Appeals, which was refused on May 9, 1984 (No. 136-84).

B. Statement of Facts

On Friday, February 27, 1981, after the State began presentation of its evidence and rested its case in chief, counsel for Petitioner presented evidence of his client's hallucinations to the court. Petitioner's counsel agreed to continue with the

trial and have Petitioner examined over the weekend. On Monday, March 2, 1981, Petitioner's counsel reported that Petitioner had been examined by his physician, Dr. Merck, the day before and that Dr. Merck's report indicated that Petitioner was incompetent to stand trial. Petitioner's counsel urged that he could not proceed with Petitioner's defense, but the court ordered that the parties would proceed with the case in chief and address the issue of competency at a future hearing. Both sides closed on March 3, 1981, and the jury verdict of guilty was returned the next day. On March 5, 1981, after hearing evidence from both sides, the jury assessed punishment at life imprisonment.

On September 21, 1981, after Petitioner had been extensively examined by expert physicians for both the defense and prosecution, the court began a competency hearing before a newly empaneled jury which lasted until October 1, 1981. The jury, pursuant to issues submitted by the court, returned verdicts finding Petitioner to have been competent during his earlier trial and competent at the time of the competency hearing. Petitioner was sentenced on October 1, 1981.

SUMMARY OF ARGUMENT

Jurisdiction under 28 U.S.C. § 1257 fails unless a federal question was raised and decided in the state court below. Petitioner did not raise his claims as violations of federal constitutional law in the Texas Court of Appeals. While he alleged constitutional grounds in a petition for discretionary review of the Court of Appeals' decision, the Texas Court of Criminal Appeals refused to review the case. Under Texas law this refusal of discretionary review is of no precedential value. Because Petitioner's constitutional claims were not presented to the Court of Appeals, and because the Court of Criminal Appeals did not decide the claims by refusing discretionary review, this Court has no jurisdiction.

Additionally, no special and important reasons exist to justify this Court's review of this case. The evidence was sufficient to support a determination of competency. Highly conflicting evidence was adduced by the state and defense. Because the jury as trier of fact credited the testimony of the state's

witnesses rather than that of Petitioner's, the evidence was sufficient to show that Petitioner was competent. Finally, the prosecutor's suggestion during questioning that Petitioner had been convicted of murder did not render his trial fundamentally unfair. Because the reference to conviction was a very brief reference in the context of a hypothetical question, and was followed by a curative instruction, no violation of due process occurred.

REASONS FOR DENYING THE WRIT

I.

THE FEDERAL QUESTION SOUGHT TO BE REVIEWED WAS NOT TIMELY RAISED AND WAS NOT PASSED ON BY THE LOWER COURTS

Jurisdiction under 28 U.S.C. § 1257 fails unless a federal question has been both raised and decided in the state court below. *Illinois v. Gates*, ___ U.S. ___, 103 S.Ct. 2317, 2321-23 (1983); *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969). Because the appellate opinion of the Texas Court of Appeals and the order of the Texas Court of Criminal Appeals refusing discretionary review do not address, as a matter of due process and equal protection, the issues of the sufficiency of evidence to support the determination of competency and the propriety of the prosecutor's questioning, this Court must determine if these issues were presented to the Texas courts in such a manner that they were necessarily decided by the Texas courts. *Street v. New York*, 394 U.S. 576, 581 (1969).

In his brief to the Court of Appeals, Petitioner did not raise his claims as violations of federal constitutional law. He urged that the Court of Appeals review the evidence and determine that the verdict was against the great weight and preponderance of the evidence. He did not cite federal law or urge that the Court of Appeals employ the standard of review enunciated in *Jackson v. Virginia*, 443 U.S. 307 (1979), as he does now. Petitioner states that he has yet to have this standard applied to the record in his case. (Petition for Writ of Certiorari at 13). Respondent submits that this is because he never asked the Court of Appeals to apply this standard. Likewise, Petitioner's claim that the

remarks of the prosecutor violated due process and equal protection was never presented to the Court of Appeals. Petitioner merely urged that the remarks constituted reversible error under state law.

In his Petition for Discretionary Review, Petitioner asserted that the Court of Appeals had no authority to determine whether the verdict was against the great weight and preponderance of the evidence and urged the Court of Criminal Appeals to instead employ the *Jackson v. Virginia* standard as employed in *White v. Estelle*, 669 F.2d 973 (5th Cir. 1982), *cert. denied*, ___ U.S. ___, 103 S.Ct. 757 (1983). His complaint of improper remarks by the prosecutor was not presented as a federal constitutional issue even before the Court of Criminal Appeals.

In any event, the Court of Criminal Appeals refused to review the case. Under Texas law this refusal of discretionary review is not an adjudication of the issues; it is of no precedential value and does not constitute an endorsement or adoption of the reasoning of the Court of Appeals. *Sheffield v. State*, 650 S.W.2d 813 (Tex.Crim.App. 1983). Because the issues Petitioner now presents were not presented to the Court of Appeals and because the Court of Criminal Appeals did not decide the issues by refusing discretionary review, this Court has no jurisdiction. In such a situation, as this Court has noted, dismissal for want of jurisdiction is supported by sound reasons because these claims are better raised in the first instance before the Court of Criminal Appeals in a state habeas corpus proceeding under Art. 11.07, TEX. CODE CRIM. PROC. ANN. (Vernon Supp. 1984), or in a federal habeas corpus proceeding. *Cardinale v. Louisiana*, 394 U.S. at 439.

II.

THE QUESTION PRESENTED FOR REVIEW IS UNWORTHY OF THIS COURT'S ATTENTION

Rule 17 of the Rules of the Supreme Court provides that a review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. No such reason exists in this case.

III.

THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE DETERMINATION OF COMPETENCY

Because no issue of Petitioner's competency to stand trial was raised until Petitioner's trial was well underway, the court allowed the trial to proceed to a verdict before setting a competency hearing before a newly empaneled jury some six months later. Part of the six month delay was attributable to extensive psychiatric observation and evaluation (R-XVI-2680-82).¹ This procedure compiled with Art. 46.02 of the Texas Code of Criminal Procedure, and was approved in *Drope v. Missouri*, 420 U.S. 162, 182 (1975).

The Court of Appeals summarized the evidence adduced at this competency hearing as follows:

A great number of evidence was adduced on the question of competency. Both parties produced expert medical witnesses, as well as laymen who know Parker and who had observed his actions sufficiently to form opinions concerning his competency. The evidence was highly conflicting. Parker's witnesses indicated he had a history of conduct consistent with paranoid schizophrenia, and that he suffered from delusions and a persecution complex. Although his medical witnesses never actually diagnosed Parker as having schizophrenia at the times in question, they testified that on earlier psychological tests he scored similarly to people tending to have that malady. The State's evidence tended to show that Parker was not psychotic but was malingering, and that he was sufficiently competent to understand the proceedings against him and consult with his lawyer in presenting his defense. A State medical witness testified that a person can suffer from schizophrenia and still be legal-

1. Respondent is employing the same method used by Petitioner of citing to the record of the direct appeal, *Parker v. State*, 667 S.W.2d 185 (Tex.App. - Texarkana 1983).

ly competent to stand trial. There was also evidence that Parker had a history of using hallucinogenic drugs which could account for his delusions.

Parker v. State, 667 S.W.2d at 187.

On the basis of this evidence, the jury found that Petitioner was competent during the competency hearing and during his earlier trial. Petitioner essentially complains that the verdict of the jury was inconsistent with the great weight and preponderance of the evidence and requests this Court to substitute its own findings of fact for those of the jury which heard the evidence. In *Jackson v. Virginia*, this Court held that "a federal habeas court faced with a record of historical facts that supports conflicting inferences must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." 443 U.S. at 326. The standard should be no different when a petitioner seeks review through a petition for certiorari. Assuming that the jury, as the trier of fact, credited the testimony of the State's witnesses rather than the testimony of Petitioner's witnesses, the evidence was sufficient to show that Petitioner was competent. See *Maggio v. Fulford*, ____ U.S. ____ 103 S.Ct. 2261 (1983).

IV.

THE PROSECUTOR'S SUGGESTION DURING QUESTIONING AT PETITIONER'S COMPETENCY HEARING THAT PETITIONER HAD BEEN CONVICTED OF MURDER DID NOT RENDER THIS HEARING FUNDAMENTALLY UNFAIR

Petitioner contends that his competency hearing was rendered unfair because the prosecutor made improper references to the fact that there had been a prior trial. The specific sequence of questioning of which he complains is set out in his Petition for Writ of Certiorari at pages 14-16. Only the following portion of this dialogue was conducted in the presence of the jury:

Q. [Mr. Walker, Prosecutor]: Doctor, one who has been, assume this to be true, *just convicted of murder, with*

a substantial punishment would--

MR. DeGUERIN [Defense Counsel]: Just a moment, Your Honor. That is absolutely improper. I object to that statement.

THE COURT: I sustain.

MR. DeGUERIN: And, ask that it be struck from the record.

MR. WALKER: Well, sir, I will just rephrase it.

MR. DeGUERIN: Just a moment. I ask that it be struck from the record.

THE COURT: Step inside the side room, just a moment.

(R-XIV-2145-46).

When the proceedings were brought back into the presence of the jury, the court instructed the jury as follows:

THE COURT: Any questions in regard to the defendant being sentenced is going to be struck from the record and the jurors are hereby instructed and so ordered to disregard any questions that may have been made in regards to any sentencing, any sentence that may have been received by the defendant in regards to this proceeding. Counsel, you may proceed.

(R-XIV-2149).

The prosecutor's question, in this case, was merely ordinary trial error and was not sufficiently prejudicial to amount to a denial of due process. *See Donnelly v. DeChristoforo*, 416 U.S. 637, 647-48 (1974). It was merely "one moment in an extended trial and was followed by specific disapproving instructions." *Id.* at 645. Petitioner urges that this remark so distracted the jury that they could not exercise "calm judgment" on the issue of competency. Because the reference to conviction was made

very briefly, in the context of a hypothetical question, and was followed by a curative instruction, however, the effect of this remark was not prejudicial. *See, e.g., United States v. Ylida*, 643 F.2d 348 (5th Cir. 1981) [inferential comment on accused's silence is harmless error where there was a prompt objection and curative instruction]; *United States v. Macker*, 608 F.2d 123 (5th Cir. 1979) [references to illegally possessed weapon were harmless where jury was instructed to disregard]. Thus, the prosecutor's remark did not render Petitioner's competency hearing fundamentally unfair and violate due process.

CONCLUSION

For the reasons discussed above, Respondent respectfully requests that the petition for certiorari be denied.

Respectfully submitted,

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